

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GATEWAY CONTRACTING SERVICES,
LLC D/B/A GATEWAY MEDICAL
RESOURCE ALLIANCE,

Plaintiff,

vs.

SAGAMORE HEALTH NETWORK INC,
ST FRANCIS HOSPITAL & HEALTH
CENTERS DIVISION OF ST FRANCIS
HEALTH SERVICES INC A/K/A ST
FRANCIS HOSPITAL AND HEALTH
CENTERS INC,

Defendants.

CAUSE NO. IP01-1714-C-M/S

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GATEWAY CONTRACTING SERVICES,)	
LLC, d/b/a GATEWAY MEDICAL)	
RESOURCE ALLIANCE,)	
Plaintiff,)	
)	
vs.)	IP 01-1714-C-M/S
)	
SAGAMORE HEALTH NETWORK, INC.,)	
and ST. FRANCIS HOSPITAL & HEALTH)	
CENTERS DIVISION OF ST. FRANCIS)	
HEALTH SERVICES, INC., d/b/a ST.)	
FRANCIS HOSPITAL AND HEALTH)	
CENTERS, INC.,)	
Defendants.)	

CORRECTED
ORDER ON PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

This cause is now before the Court on a motion for preliminary injunction filed by the plaintiff, Gateway Contracting Services, LLC (“Gateway”), and against the defendants, Sagamore Health Network, Inc. (“Sagamore”) and St. Francis Hospital & Health Centers Division of St. Francis Health Services (“St. Francis”) (collectively, the “Defendants”). Gateway alleges that Sagamore and St. Francis conspired to exclude Gateway in the market for health network services in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, section 3 of the Clayton Act, 15 U.S.C. § 14, and section 24-1-2-1 of Indiana’s Combinations in Restraint of Trade Act, Ind. Code § 24-1-2-1. The Court held an evidentiary hearing in this matter on February 7-8, and 25-28. For the reasons discussed below, the Court **DENIES** the plaintiff’s motion for preliminary injunction.

I. FACTUAL BACKGROUND

A. THE PARTIES

Plaintiff, Gateway, is a “marketer of high-cost, high-frequency, high-technology specialty health care services” that supplements “employers’ current benefit offerings with health care benefit enhancements for: Cardiovascular Care; Orthopaedic Services; Oncology Treatment Programs; Women’s Health Services; Neurosurgery Services; and Urology and Gastroenterology Procedures.” SFH Exh. 15, Business Plan, Gateway, L.L.C., Oct. 1, 2001, at 2 (“Gateway 2001 Bus. Plan”). *See also* Hrg. Tr. at 28, 36, Kopp-Direct. Gateway started in 1996. *Id.* at 28. Currently, Gateway offers a cardiovascular care product and an orthopedic care services product, although it plans to offer the remaining services in the future. *Id.* at 116, Kopp-Cross. Some people call Gateway’s product a supplemental network or a carve-out network, *id.* at 740, Yust-Direct; Gateway prefers the term “enhancement.” *Id.* at 28, Kopp-Direct.

Gateway’s product at issue in this case, the cardiovascular product, features a global case rate, or “a fixed price for an episode of care for certain high volume, high cost heart care procedures that occur either individually or in combination.” *Id.* at 32-33. Other features of the product that Gateway promotes include a lower price to the employer than comparable procedural costs at non-Gateway physicians and hospitals, a guaranteed rate for three years, free risk assessments for all employees enrolled by an employer with feedback to the employer, a readmit guarantee that provides services for complications that arise within thirty days of certain procedures at no cost, a lower cost to the employee/patient because the employers agree to reimburse the total cost of the procedure

without a co-pay, co-insurance or deductible expense to the employee. *Id.* at 33-35. The later feature provides nearly 100% steerage to Gateway providers when Gateway is offered in conjunction with another comprehensive network. *Id.* at 41. Gateway wants “to be a leading marketer of health care services through [its] global case rate programs.” *Id.* at 121, Kopp-Cross. *See also* SFH Exh. 15, Gateway 2001 Bus. Plan, at 4. Gateway envisions a benefit to members and network providers “from the steerage associated with Gateway’s products. The absence of out-of-pocket expenses for the employee and Gateway’s case management of prospective patients cause a high percentage of steerage to network providers and reduce overhead associated with patient payables.” SFH Exh. 15, Gateway 2001 Bus. Plan, at 16.

Gateway has a regional network of healthcare providers in Indiana, Illinois, Ohio and Kentucky. Hrg. Tr. at 122, Kopp-Cross. The company is owned by three physician groups including The Care Group, a group of cardiologists at St Vincent Hospital in Indianapolis, Ohio Valley Heart Care, a group of cardiologists and cardiovascular surgeons in Evansville, Indiana, and Midwest Heart Specialists, a group of heart specialists in Illinois. *Id.* at 29, Kopp-Direct. The Care Group at St. Vincent Hospital is the Gateway network’s only provider of cardiovascular services in the Indianapolis area. *Id.* St. Vincent Hospital is located on the north side of Indianapolis. St. Mary’s Hospital is Gateway’s provider of cardiovascular services in the Evansville area. *Id.* at 61.

Gateway’s customers are third party administrators (“TPAs”), insurance brokers, small business insurers, and employers. *Id.* at 122, Kopp-Cross. In its 2001 Business Plan, Gateway describes its competition as follows:

The healthcare [sic] industry is extremely competitive and includes numerous networks, health plans, managed care companies, and insurers, many of whom have achieved substantial market share. Gateway competes with many different

companies, depending upon geographic location. We generally compete against five large health insurers who develop, and manage their own networks, and offer an insurance-based product such as a PPO or an HMO:

- Blue Cross & Blue Shield,
- Aetna,
- United Healthcare,
- CIGNA,
- Humana.

Current clients of existing customers and prospective customers and their clients evaluate our capabilities against the merits of insured, or fully integrated managed care products.

In addition, in recent years the health care industry has seen the development of rental networks, disease management companies, and provider developed market initiatives. Companies that might be allies or competitors include:

- Sagamore
- Encore
- M•Plan
- SIHO
- Private Health Care Systems

Many of the organizations offer more comprehensive products than Gateway's offering. We believe our sales and marketing strategy, physician ownership, and the unique features of our product can continue to overcome the broader product offerings of these competitors. Most of our competitors have greater financial and other resources than Gateway. As competitors modify their products and reduce their prices, they may increase their ability to meet the health care benefit needs of the employer community. We believe that the principal competitive factors in the segments of the health care industry in which Gateway competes are: cost; technological capabilities; responsiveness and flexibility; range of services available; location of physicians, hospitals, and health care facilities; and, ease of administration. Failure to satisfy any of the foregoing requirements might seriously affect Gateway's business.

SFH Exh. 15, Gateway 2001 Bus. Plan, at 7-8.

Gateway's 2001 Business Plan suggests that at an enrollment of 65,000 employees, the company would be profitable; its enrollment in October 2001, when the plan was written was

between 70 and 75,000 employees, almost double its prior year's enrollment. Hrg. Tr. at 129, 119, 127, Kopp-Cross. At the time of the hearing in this matter, in February 2002, Gateway's enrollment had climbed to 80 to 85,000 employees. *Id.* at 119.

Defendant, St. Francis, is a hospital network in the Indianapolis area. It is located on the south side of Indianapolis. St. Francis contracts with various health care provider networks including Sagamore. Apparently, St. Francis has plans to build its own cardiovascular care center.

Jay Brehm ("Brehm") is Regional Chief Financial Officer for St. Francis and supervises employees who have responsibility for negotiating managed care contracts. Brehm reports to Bob Brody ("Brody") who is President and Chief Executive Officer of St. Francis. *Id.* at 468, Brehm-Cross.

In determining whether to contract as a provider in a managed care network St. Francis weighs several criteria including the sight of the network, its membership, its claims payment history, the size of the network, the steerage provided by the network, i.e. whether there is a penalty for out-of-network usage, and whether it has carve-out networks associated with it. The size of the network is particularly important to St. Francis in the Indianapolis area; it looks for whether the largest four hospital systems in Indianapolis are included in the network. Steerage is important to St. Francis because the key feature of a managed care product is volume and the steerage component plays an important role in the amount of volume St. Francis can receive from a particular payor.

St. Francis contracted with Sagamore in 1996 to be part of Sagamore's managed care network. Pl.'s Exh. 1, Agreement, By & Between Sagamore Health Network, Inc. and St. Francis Health Network, Inc. ("St. Francis/Sagamore Contract"). Section 4.01 of that contracts states, in relevant part:

4.01 **Obligations of Sagamore.** In order to fulfill the purposes and objectives of this Agreement, and to effectuate the delivery of quality, cost-effective healthcare [sic] services to Covered Patients, Sagamore agrees to covenants as follows:

- (a) Marketing Efforts. Sagamore shall include the [St. Francis] Providers participating in the Sagamore Health Network in such advertising and marketing promotions of Sagamore as Sagamore deems appropriate so long as all representations made concerning [St. Francis] Providers are factual and accurate.
- (b) Contractual Relations. Sagamore shall use its best efforts to enter into contractual relations with third parties to increase and maximize the number of contractual relations with third parties to increase and maximize the number of Covered Patients and to be sure that incentives exist or will be added to the benefit plans to encourage those Covered Patients to utilize the services of Sagamore Health Network Providers.

Id. at 6-7. This is the only part of the contract that talks about incentives for patients to use providers in Sagamore's network. The contract is renegotiated once per year; however, the contract provides for termination without cause upon sixty days written notice. *Id.* at 9, § 4.3.

Defendant, Sagamore, is a managed care company that offers three different managed care network products to employers. Hrg. Tr. at 624, Yust-Direct. Two of the products are preferred provider organizations ("PPOs"); the other product is a point of service ("POS") network. *Id.* The difference between Sagamore's two PPOs is the size of the network and the resulting discount from providers within the networks. *Id.* at 624-25. Generally, the smaller the network, the larger the discount because the steerage is greater through the smaller network. *Id.* at 625, 628-29, 636-38. The POS product is different from a PPO because users of the POS must select a primary care physician, whereas a user of a PPO may use any physician he or she wants to use. *Id.* at 625. Sagamore also provides medical management services, utilization review and third party

administration to some customers. *Id.* at 624.

Sagamore has provider hospitals throughout the State of Indiana, including Evansville and Fort Wayne. In the Indianapolis area, Sagamore has provider contracts with all four major hospital networks including St. Francis, St. Vincent, Clarian and Community Health Network (“Community”). *See* SAG Exh. 18, Amendment to the PPO Provider Agreement By & Between Sagamore Health Network, Inc. and Clarian Health Partners, Inc., Jan. 1, 2001 (“Sagamore/Clarian Contract”); SAG Exh. 20, Agreement By & Between Sagamore Health Network, Inc. & St. Francis Health Network, Inc., July 1, 1996 (“Sagamore/St. Francis Contract”); SAG Exh. 21, Amendment to the Hospital Agreement Between Sagamore Health Network, Inc. & St. Vincent Hospital & Health Care Center, Inc., Jan. 1, 2000 (“Sagamore/St. Vincent Contract”).

Sagamore considers payors and employer groups its customers. Hrg. Tr. at 349, Witt-Direct. The company sells its network services through insurance carriers and TPAs, although it has some relationships directly with employer groups. *Id.* at 371. But, the majority of its business is through TPAs and insurance carriers. During the period from 1995 through 2000, Sagamore’s largest enrollment growth came through TPAs. Pl.’s Exh. 17, Sagamore, Bd. of Dir. and Shareholder Retreat, May 7, 2001, at 44 (“Sagamore Bd. Retreat”). Sagamore competes with all types of managed care services including PPOs, POSs, HMOs, proprietary PPOs and traditional indemnity plans. Hrg. Tr. at 644-45, Yust-Direct.

Sagamore is owned by four catholic hospital groups: Sisters of St. Francis Health Services, Ancilla Systems, Inc., St. Joseph’s Regional Medical Center, and Ascension Health. *Id.* at 627. St. Francis is owned by Sisters of St. Francis Health Services. St. Vincent Hospital is owned by Ascension Health. Both St. Francis and St. Vincent have representatives on Sagamore’s Board of

Directors. SAG Exh. 39, Sagamore Health Network, Inc., Board of Directors, Calendar Year 2001. Although Brehm is currently serving as Chairman of the Board and had that position throughout 2000 and 2001, the chairmanship rotates through the various owners of Sagamore. *Id.* at 447, Brehm-Direct. Gregory Yust (“Yust”) is currently Chief Executive Officer of the company. *Id.* at 623, Yust-Direct.

B. EVENTS LEADING UP TO THIS LAW SUIT

In October 2000, the Hoosier School Benefits Trust (“HSBT”) account purchased the Gateway product for its enrollees through a broker, Frank Crossland (“Crossland”) at M-J Insurance, and a TPA, the Nyhart Co., working in tandem. Hrg. Tr. at 45, Kopp-Direct. HSBT is a trust of school districts through which the employees in those districts receive health benefits. *Id.* HSBT is located in Marion County and covers the west side of Marion County, beginning with Pike Township, going south all the way down through the south side of Marion County and Indianapolis. *Id.* at 45-46. Apparently, the majority of the members of the HSBT live on the south side of Marion County. *Id.* at 47. The HSBT also purchases the Sagamore network.

At St. Francis, Brehm first became aware of Gateway in the late 1990s. He became more familiar with it in the fall of 2000 when he learned through one of his staff members, Jenny Westlaw (“Westlaw”), that the HSBT account had contracted with Gateway. Shortly thereafter, he discussed the situation with Keith Louter, Vice President of Finance, Westlaw, and Brody; they reached a consensus about supplemental networks such as Gateway. Brehm called Yust and John Johnson (“Johnson”), Chief Financial Officer at Sagamore, to inform Sagamore of St. Francis’ concerns with

respect to accounts that purchase Gateway along with the Sagamore network. Hrg. Tr. at 449, Brehm-Direct.

Apparently, after Brehm notified Sagamore that St. Francis had a problem with Gateway, Yust and the “executive team” had some internal discussion about the issue. *Id.* at 398, 405, Yust-Direct. One e-mail from Don Park (“Park”), Sagamore’s Statewide Director of Business Development, stated, in relevant part:

Subject: Jay Brehm - Gateway

I spoke to both Cheryl and Dwight about Jay’s threat to reduce St. Francis’ discount to zero for the Nyhart group (Hoosier School Trust?) using Gateway. Cheryl did confirm that John Mosley had, at one point, told her that he was trying to get into the Gateway program.

On the assumption that the first step is for you to ask Jay to give us a letter outlining his position, we would like to suggest that you attempt to get Jay to:

- 1) Specifically clarify, within the letter, that his position is one which will apply to any and all networks with whom he contracts; not just Sagamore.

And

- 2) Specifically define that the position applies to the specific group(s) involved and not to all groups being administered by that particular payor. [sic]

Pl.’s Exh. 4, E-mail, To: Greg Yust, cc: Dwight Hall; Cheryl Perdue, From: Don Park, RE: Jay Brehm - Gateway, Nov. 15, 2000.

At both Yust’s and Johnson’s request, Brehm put St. Francis’ position in writing. Brehm’s letter, dated November 28, 2000, stated, in relevant part:

Dear John [Johnson]:

We have recently become aware that certain accounts who access Sagamore Health Network may also be utilizing the cardiac related product known as Gateway.

Our hospital agreement with Sagamore provides that members will have equal access to our facility for all of the services that we offer. Our negotiated pricing arrangement with Sagamore is based on that assumption.

Because of this additional product offering, patients are being incentivised/steered to other facilities for one of our primary service lines. We would therefore require that the St. Francis Hospital discount for accounts who utilize this or any other type of carve out product be reduced to zero.

Please be assured that we are not singling Sagamore out on this issue and that we will apply the same conditions with the other networks with which we have contracted. Should you have any questions, please feel free to give me a call at (317) 783-8470.

Pl.'s Exh. 5, Letter, To: Mr. John Johnson, V.P. of Finance, Sagamore Health Network, Inc., From Jay R. Brehm, Regional CFO, St. Francis Hospital & Health Centers, Nov. 28, 2000 ("St. Francis/Sagamore Letter"). Brehm did not send a similar letter to any other networks for which it contracts as a provider. However, he did communicate to other rental networks St. Francis' position with respect to Gateway including Encore and Indiana Health Network ("IHN"). Hrg. Tr. at 471, Brehm-Cross.

By January 2001, Sagamore's executive team had discussed with Nyhart, the HSBT's TPA, the fact that the HSBT had purchased the Gateway Network. *Id.* at 744, Yust-Direct. Park sent a letter to Nyhart dated January 3, 2001, that outlined Sagamore's position on Nyhart's practice of co-offering the Sagamore and Gateway networks together. The letter stated, in relevant part:

Dear [Nyhart]:

This letter is intended as a follow-up to our conversation of December 21st concerning the overlapping of alternative network products in situations where Sagamore Health Network is being used. The specific situation we discussed was relative to the Hoosier School Benefit[s] Trust and their use of the Gateway Cardiovascular Network as an overlay.

As we discussed, Sagamore's provider contracts stipulate that those providers, both hospitals and physicians, will have equal access to Sagamore covered members. Although we can appreciate the merits of the Gateway product, the fact remains that it incentivizes Sagamore members to use a specific subset of our network in Indianapolis.

Cardiology and cardiovascular service lines are considered "premier" service lines by those delivery systems that have these capabilities. The pricing concessions that Sagamore is able to negotiate with these providers anticipates that they will have equal access to all of our members and won't be disadvantaged.

In this case we are simply enforcing the terms of our payor access agreement which prohibits the overlay of these types of products. We understand that it would be difficult to remove this product mid-year and therefore would simply ask that it be removed at next open enrollment or renewal.

In areas where the Gateway Network is not in conflict with the Sagamore Network, this concern is eliminated.

Pl.'s Exh. 6, Letter, To: Gary Chattin, Sr. VP, Marketing, Nyhart Co., From: Don Park, Sagamore, Jan.3, 2001. Nyhart forwarded a copy of this letter to Crossland at M-J Insurance. Hrg. Tr. at 226-27, Crossland-Direct. Over the next several months, Crossland participated in meetings with Kopp and Yust. *Id.* at 747-48, Yust-Direct. Crossland testified that the meetings were held to determine if an arrangement could be made where all parties were satisfied with the services being offered to HSBT. *Id.* at 227-28, Crossland-Direct. Crossland's position at the meetings was that continuing with Gateway was important for his clients to "offset some of the trends" in health care costs. *Id.* at 228. No resolution was reached during the meetings. *Id.*

Crossland received a letter from Sagamore dated August 22, 2001, that outlined Sagamore's position with respect to supplemental networks, such as Gateway. The letter stated, in relevant part:

We appreciate your business and would like to respond to your request for documentation on our opinion of supplemental networks. As you know, Sagamore Health Network has been doing business in this marketplace for 16 years. Our success has been built on the intention of offering attractive and

competitive discounts at our network facilities for your clients to help them save money and maintain access to the providers of their choice. Obviously, we are very interested in maintaining the core position of our purpose of doing business. Sagamore's network provides a full compliment of services inclusive of most supplemental network offerings.

If one of your clients is pursuing a supplemental network due to a perceived issue of quality or access within our network, obviously we would want to become aware of any deficiencies immediately to pursue corrective action.

When we negotiate with our network providers, they expect equal access and equal incentives for members to use all of the network providers. In return, they provide competitive discounts to us to pass along to your clients using the network. With that in mind, we have carefully considered how we can co-exist with supplemental type networks being offered along side our network. At this time, we have determined that anytime a supplemental network offers a benefit/financial differential to the members of a group plan it causes the following issues for Sagamore Health Network:

- members are encouraged to use other providers that may or may not be participating in the Sagamore network.
- the integrity of the entire Sagamore network is disadvantaged as certain facilities/physicians are favored over others due to special enticements to the member.
- other factors steering patients to specific providers, weakens our negotiating abilities at the disadvantaged facilities, thus, reducing our overall network strength for your clients.

Based on the above points and our overall purpose of doing business outlined above, we do not foresee an opportunity to be co-offered with supplemental networks. Ultimately, we will respect any business decision that you and your clients have to make. We are hopeful that your future decisions do include the Sagamore Health Network.

Pl.'s Exh. 8, Letter, To: Frank Crossland, M-J Insurance, From: Kelly J. Witt, VP, Marketing & Sales, Sagamore, Aug. 22, 2001 ("Sagamore Supplemental Network Letter"). Crossland testified that M-J Insurance felt threatened by the letter because most of its clients who use a managed care network use Sagamore. Hrg. Tr. at 231, Crossland-Direct. Crossland shared Sagamore's letter with the trustees of the HSBT. *Id.* at 230.

Apparently, Crossland had become aware of St. Francis' concerns about Gateway during this time and had communicated that to the HSBT because in August 2001, the HSBT trustees asked Crossland to get a written response from St. Francis about the Gateway "matter." *Id.* at 233. *See also* Pl.'s Exh. 33, Letter, To: Mr. Jay Brehm, CFO, St. Francis Hosp., From: Frank Crossland, M-J Insurance, Aug. 23, 2001. St. Francis responded by letter dated August 30, 2001. *See* Hrg. Tr. at 234. The letter stated, in relevant part:

This letter is in response to your correspondence of August 23 regarding the M-J Insurance/Hoosier School Benefit Trust and Gateway Medical Resource Alliance. Please be assured that St. Francis is not singling out this arrangement but simply trying to be consistent.

It is important to understand that when St. Francis offers pricing concessions to a managed care network, it does so with the assumption that we will have equal access to all members who utilize that network. In situations where those members are incentivized to utilize facilities other than St. Francis, we believe that this significantly minimizes the benefits that St. Francis anticipates receiving in return for the discounts that we offer.

We have heard that representations relative to the quality of services may have played a part in the Hoosier School Benefit Trust's decision. If so, St. Francis would appreciate the opportunity to present information on the quality of services at our facilities.

It is important to understand that St. Francis takes this position with all networks with which it contracts. We believe that this approach is not unreasonable and is consistent with the approach taken by hospital providers in general.

St. Francis values the relationship with the Hoosier School Benefit Trust and M-J Insurance. We believe that the discount St. Francis offers through Sagamore across all service lines is significant. We assume that in return we will not be disadvantaged as a hospital network participant.

Pl.'s Exh. 10, To: Frank Crossland, VP, M-J Insurance, From: Jay Brehm, St. Francis Hosp., Aug. 30, 2001 ("St. Francis/M-J Ins. Letter"). Despite these letters, the HSBT maintained both the Sagamore and Gateway networks when it renewed its contracts in October 2001. Hrg. Tr. at 254,

Crossland-Cross.

In addition to St. Francis' complaint about Gateway and its product, in the summer of 2001, Sagamore received a complaint from Vincennes Hospital in Vincennes, Indiana (or Knox County), about Gateway's program with St. Mary's in the Evansville area. *Id.* at 758-59, Yust-Direct. Sagamore sent the following letter in response to complaints in the Evansville market:

Alan Chamberlain, CPA
Executive Director
Ohio Valley Heart Care, Inc.
1400 Professional Boulevard
Evansville, Indiana 47714

Dear Alan:

We understand that you have requested a letter documenting Sagamore's position on the Gateway product(s) relative to the Evansville area. As we have stated previously, we do not object to our customers in the Evansville area offering the Gateway product in conjunction with the Sagamore Network.

Sagamore reserves the right to review this position after the first quarter of 2002. If there is any change in Gateway's or Sagamore's provider network for services offered in the Evansville area, we may modify our position.

You should be aware that Sagamore staff in Evansville did communicate this position to the local payor/broker/agent market.

Pl.'s Exh. 28, Letter, To: Alan Chamberlain, Exec. Dir., Ohio Valley Heart Care, Inc., From Greg Yust, Sagamore, Dec. 19, 2001.

Further, Community, another hospital in Sagamore's network in the Indianapolis area had complained to Sagamore about Gateway's steerage mechanisms by at least August 1, 2001. *See* Pl.'s Exh. 9, E-mail String, To: Greg Yust, Sharon Paulus, From: John Johnson (Sagamore), RE: FW: Gateway, To: John Johnson, From: Dave Delaney (Community), Aug. 1, 2001 ("Community E-mail") (stating that Sagamore's inability or unwillingness to deal with the issue left it little

alternative but to adopt a defensive strategy of its own). Community's communication with Sagamore specifically adopted a position with respect to payors who purchased Gateway along side Sagamore. Community's communication stated, in pertinent part:

Subject: Gateway

John Johnson:

We spoke with Humana last week in Chicago and they indicated that they would not be entering into a carve out with Gateway or any other type of carve out in the immediate future.

Now, we have discussed this issue further here at Community Hospital and have come to a conclusion that payers [sic] and networks are not going to deal with this issue effectively. As such we have come up with the following thoughts as it related to payers [sic] and networks.

1. We will require a detail listing, updated monthly, that identifies those payers [sic] and employers who have added on the Gateway network to the Sagamore Plus network.
2. Because of [sic] willingness of Sagamore to allow payers [sic] to steer business away from Community Hospitals for these cardiac services, which is not the nature of the contracting and negotiating idealism, we will require Sagamore to separately price the Community Hospital network for those who have added the Gateway product. We intend to reduce our discount to these payers [sic] by 4% from the currently contracted rate with Sagamore.
3. Because the value of the administrative fee which Sagamore charges to Community Hospitals is related to [sic] ability of Sagamore to sell networks that steer patients to Community Hospitals, we must also take this into consideration. We feel that it is necessary to reduce our administrative fee paid to Sagamore by a full 2 basis points.

John, you know that we did not wish to come to this point but the inability or unwillingness of Sagamore to deal with this issue leaves us with little alternative. I would like to understand from you how you wish to proceed. I can send a termination letter to you or we can simply agree to negotiate this without the immediate threat of termination. I wish Sagamore had come through with its earlier commitment to solve this issue. Please let me know immediately how we need to proceed.

Sincerely,

David F. Delaney
CFO, Indiana Pro Health Network, Inc.
Vice President, Payor Contracting
Community Hospitals of Indiana, Inc.

Id.

During early- to mid-2001, Sagamore assessed its position with respect to supplemental or carve out networks generally. Kelly Witt (“Witt”), Vice President of Marketing & Sales, directed that effort. *See* SAG Exh. 28, E-mail, To: PPO Marketing; Executive PPO; Jackie Lee-McCord, From: Kelly Witt, RE: Carve Outs, Apr. 5, 2001. In April 2001, Witt compiled ideas from her staff on matters such as how to handle the issue, concerns raised and next steps. She published her compilation, which stated in relevant part:

Issue

Payor’s using carve out networks for mental/nervous treatment, lab services and cardiovascular services diminishes Sagamore’s negotiating abilities and maintenance of the most competitive discounts network wide.

Objective

To determine Sagamore’s stance on how to deal with our critical business partners on this issue. Generate discussion with Executive Staff to consider all viewpoints and what is an appropriate course of action for the future.

* * *

Provider v. Payor Notification - sensitive issue

A provider letter was prepared to advise them that we would take action with our payors if a carve out [sic] network was not removed at the next renewal. This was due in lieu of an agreed upon letter that Marketing was to begin sending to payors last year. The letter to payors was never sent, however, Network has been using the language with providers. (See attached email [sic] dated 7/14/99, reflective of payor language). [sic]

Ideas Gathered on How to Handle the Issue

- Possibly offer our own carve out network deals to compete.

- If the Payor will not comply with our no carve out requirement, perhaps we have a modified contract allowing them to remain with us at the same access fee but tie the payor to the lowest level of discount provided by the hospital, i.e., the hospital is providing the penalty, no [Sagamore]. We would need “buy in” from the hospitals that they are doing the same for other PPO networks.
- Educate the payors that carve outs weaken steerage, erode negotiation capability and threaten network viability.
- Possibly ring the issue of price concession v. steerage to a new level of visibility [sic] in the marketplace. . . .
- All Carve Outs should be treated individually. We should not apply the same rules to the various carve outs.
- Determine a way to work with the current carve out networks and offer along side our network and take a cut of the revenue.
- Set up criteria by which we could allow a carve out and place a charge on this service, i.e., like a lease arrangement. This might give us the opportunity to work with the payors and our owners and everyone wins.

Concerns Raised

- If SHN takes a strong stance on this, brokers/payors will move to other networks that aren’t as assertive on this issue. We will lose membership.
- It will give payors/clients another indication that SHN is being inflexible.
- If we raised access fees for payors that use carve outs, would we be able to keep track of the different access fees for groups that have carve outs v. those that don’t?
- St. Mary’s in Evansville has contracted directly with Gateway to be an exclusive hospital for the area. How can we have an arrangement like this Evansville [sic] with an owner hospital and apply different guidelines in other parts of Indiana?
- If a patient is at a hospital which is not in the Gateway network, the patient must be moved to the appropriate facility. This places the patient in jeopardy . . . who is responsible legally if something negative happens?
- We need to abide by whatever we set up for other payors within our own TPA business, i.e., AM General is a TPA client who has a chiro [sic] network carve out and a mental/health network carve out.

Pl.’s Exh. 15, Kelly Witt, “Carve Out Networks [sic]”, Apr. 23, 2001 (no e-mail attachment in exhibit). Apparently, in response to Witt’s inquiry, one Sagmore employee pointed out that the company had addressed the issue of carve-out networks approximately one year prior in response to complaints about the supplemental network called LabOne. SAG Exh. 28, E-mail, To: PPO

Marketing; Executive PPO; Jackie Lee-McCord, From: Kelly Witt, RE: Carve Outs, Apr. 5, 2001, at SHN 32070, E-mail, Reply to Witt, From Jackie Lee-McCord, Apr. 9, 2001. At that time, approximately April 2000, Sagamore's executives had agreed that only carve-out networks built for "out of area" services would be allowed. *Id.* A letter was drafted for publication to all of Sagamore's payors about the position, but it was not sent. *Id.*; *id.* at SHN 32072.

At some time prior to August 22, 2001, Sagamore's executive team renewed Sagamore's original position relative to carve-out networks. *See* SAG Exh. 43, PPO CLAIMS QUALITY IMPROVEMENT TEAM MINUTES, SAGAMORE HEALTH NETWORK, INC., Aug. 29, 2001. Sagamore again decided that it could not and would not "allow carve out [sic] networks to be placed along side [its] network within the same benefit plan." *Id.*

In October 2001, Sagamore sent letters about its position on carve-out networks to all of its payors across the country. Hrg. Tr. at 829, Witt-Direct; SAG Exh. 47, Sagamore List of Brokers/Payors. The letter stated, in relevant part:

Re: Supplemental Networks

Dear [Broker/Payor]:

Over the last several months, Sagamore Health Network has communicated to many of our valued payor partners that we are concerned about the offering of supplemental or limited networks along side our comprehensive network. Our success in Indiana over the last 16 years has been build on our ability to negotiate competitive discounts at our network facilities for your clients. Obviously, we are very interested in continuing this practice.

When we negotiate with our network providers, they expect equal access to Sagamore members. In return, they provide competitive discounts to us to pass along to your clients who use the network. The integrity of the entire Sagamore network is at risk when certain facilities/physicians are favored over others due to special financial incentives to members.

We believe that continued use and development of supplemental or limited networks (exclusive of dental, vision and pharmacy networks) will ultimately undermine the ability of both payors and the network to bring the most comprehensive and competitive packages of benefits and products to the general public.

Please be advised that unless previously approved, we will not condone the allowance of supplemental or limited networks to be used alongside our network in the future. If you are currently offering a supplemental network alongside our network, please contact me to further discuss this matter.

Pl.'s Exh. 11, Letter, To: Alice J. Swanson, Gardner & White, From: Anita Strauss, Bus. Dev. Exec., Sagamore Health Networks, Inc., Oct. 12, 2001.

In response to Sagamore's letter, according to some of Sagamore's TPAs and brokers, some employer/customers of Sagamore's chose to stay with Gateway and look for another comprehensive network; some employers chose to stay with Sagamore and forego the product offered by Gateway. *See* Pl.'s Exh. 12, E-mail, To: Greg Yust, From: Kelly Witt, RE: FW: Supplemental Networks, Nov. 7, 2001; SFH 19, E-mail, From Dawnielle Lang, To: Deb Persic, cc: Colleen North, Terry Kopp, RE: Gateway, Nov. 5, 2001; SAG Exh. 29, E-mail, From: Kelly Witt, To: Greg Yust, cc: Sharon Paulus, RE: Supplemental Networks; Nov. 7, 2001; Hrg. Tr. at 183, Kopp-Cross; *id.* at 833-34, Witt-Direct.

Gateway filed its complaint on November 13, 2001 in which it alleged that St. Francis, Sagamore, brokers and TPAs used concerted effort to preclude employers from using the Gateway network in the Indianapolis metropolitan area in violation of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, and Indiana's Combinations in Restraint of Trade Act, Indiana Code § 24-1-2-1. In addition, Gateway alleged that Sagamore and/or St. Francis deliberately interfered with actual and prospective relationships Gateway had with subscribers. Through its complaint,

Gateway seeks a preliminary and permanent injunction against the acts described therein, actual and treble damages, as provided by law, punitive damages, and costs and attorneys' fees.

During the period between November 12, 2001, when the complaint was filed, and February 7, 2002, when the hearing on Gateway's motion for preliminary injunction was scheduled, and pursuant to an agreement by the parties, Sagamore sent out a letter to its payors that stated, in relevant part:

This is to confirm to you that until the earlier of a ruling by the federal district court on Gateway Medical Resource Alliance's ("Gateway") request for a preliminary injunction or March 7, 2002, Sagamore Health Network, Inc. ("Sagamore") has agreed to do business in the ordinary course, on a non discriminatory basis, with all those existing, future or prospective employers, third-party administrators, brokers, insurance groups, customers or other individuals involved, in the selection of health care programs, without regard to whether or not those persons firms or groups are also subscribers to any program of Gateway.

In particular, Sagamore will not terminate, decline to initiate or cancel any relationship with anyone because a Gateway program is purchased.

Pl.'s' Exh. 29, Letter, To: Whom It May Concern, From: Greg Yust, CEO, Sagamore Health Network, Inc., Dec. 6, 2001.

II. STANDARDS

A. PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy granted only when there is a clear showing of need. *See Cooper v. Salazar* 196 F.3d 809, 813 (7th Cir. 1999). In order to be entitled to such relief Gateway must show a likelihood of success on the merits, irreparable harm if the injunction is denied, and the inadequacy of any remedy at law. *See Ty, Inc. v. Jones Group, Inc.*, 237

F.3d 891, 896 (7th Cir. 2001); *Cooper*, 196 F.3d at 813. Once Gateway makes this threshold showing, the Court balances the hardship on Gateway if the injunction is wrongfully denied against the hardship on the defendants if it is wrongfully granted, and considers the impact of the injunction on the public interest. *See Cooper*, 196 F.3d at 813; *Ferrell v. United States Dep't of Housing & Urban Dev.*, 186 F.3d 805, 811 (7th Cir. 1999). The injunction will not issue if the factors do not favor Gateway.

Although courts should make findings with respect to each of the factors and then weigh each against the other, it is not always necessary to make findings with respect to the relative harms and the public interest when a movant has failed to carry its burden on the crucial threshold factors. *See Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994). Logically then, any preliminary injunction analysis should begin with determining the plaintiff's likelihood of success on the merits.

B. SHERMAN ACT, § 1

Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is hereby declared to be illegal.” 15 U.S.C. § 1. To show likelihood of success on the merits of its claim under Section 1 of the Sherman Act, requires that Gateway show proof of three elements: “(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.” *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (citing *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148,

1158 (5th Cir. 1992), *cert. denied*, 506 U.S. 1079; *Wilder Enters., Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1139 n.1 (4th Cir. 1980); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.3d 830, 844 (9th Cir. 1980); *cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The Court will discuss the standards for each element as necessary to the discussion of the merits.

The parties focused on the elements of an antitrust violation under the Sherman Act, § 1 at the hearing in this matter. In addition, Gateway argues that the standards for finding a violation under the Sherman Act, § 1 are coextensive with finding a violation under the Clayton Act, § 3. Further, the Court finds that Indiana's illegal combination antitrust prohibitions should be analyzed using federal antitrust guidelines because it is patterned after the Sherman Act. *Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301, 302 (S.D. Ind. 1977) (citing *Fort Wayne Cleaners & Dyers Assoc. v. Price*, 137 N.E.2d 738 (Ind. Ct. App. 1956); *Citizens Nat'l Bank of Grant County v. First Nat'l Bank in Marion*, 331 N.E.2d 471, 478 n.5 (Ind. Ct. App. 1975)). Therefore, the Court will apply the standards for the Sherman Act, § 1, to the facts in this case to determine whether an injunction is appropriate. The other statutes relevant to the inquiry are set forth as reference.

C. CLAYTON ACT, § 3

Section 3 of the Clayton Act states in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or

understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. St. Francis disputes the application of this antitrust statute to health care services that are the issue in this case.

D. INDIANA CODE § 24-1-2-1

Indiana's illegal combination statute states, in pertinent part:

Every scheme, contract or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce, or to deny or refuse to any person participation, on equal terms with others, . . . or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity, or to prevent competition in manufacturing, within or without this state, is illegal

Ind. Code § 24-1-2-1.

III. DISCUSSION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Gateway alleges several conspiracies in restraint of trade in this case, namely: (1) a conspiracy between hospitals acting through Sagamore to prevent Gateway from establishing a place in the market; (2) a conspiracy among TPAs and brokers who were coerced by Sagamore to limit the sale of Gateway's network to employers; and (3) a conspiracy between St. Francis and Sagamore to prevent Gateway from establishing a place in the market. Gateway argues that the formation of these

conspiracies was illegal *per se*. The Court will address each of the alleged conspiracies in turn.

1. Conspiracy Between Hospitals

Gateway argues that St. Francis' communications with Sagamore in October and November 2000, about its problem with Gateway as a supplement to Sagamore's comprehensive network establish an agreement by Sagamore to do something to resolve the issue. Further, Community's letter to Sagamore that indicated Community's decision to act because Sagamore had not come through on its "prior commitment" to resolve the issue, evidences Community's similar reliance on Sagamore. Because competitors, Community and St. Francis, had both received a commitment from Sagamore to resolve the issue of Gateway specifically, or carve-out networks more generally, Gateway submits that a horizontal conspiracy was formed to eliminate the "price incentive" offered through Gateway on coronary care services. Therefore, pursuant to *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), St. Francis and Sagamore are liable *per se* under Section 1 of the Sherman Act.

Sagamore and St. Francis argue that the evidence shows independent business decisions on behalf of both St. Francis and Community. Further, there is no evidence to suggest that either St. Francis or Community knew about the other hospital's concern about the Gateway network.

In the antitrust context, a conspiracy is present when two or more parties have "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). When circumstantial evidence of a conspiracy is used, "there must be some evidence that 'tends to exclude

the possibility' that the alleged conspirators acted independently.'" *Toys "R" Us*, 221 F.3d at 934 (quoting *Monsanto*, 465 U.S. at 764).

With respect to the conspiracy alleged here, one that involved Sagamore's alleged commitment to two hospitals in its network to resolve the disincentives to those hospitals when an employer chose to lay Gateway on top of Sagamore's comprehensive network, the Court finds that Gateway is not likely to prove such a conspiracy. There is no evidence in the record that suggests any communication occurred between Community and St. Francis. The fact that St. Francis' communications with Sagamore primarily occurred in late 2000, and Community's primarily occurred in 2001, also suggests that the hospitals had no knowledge of the other's positions with respect to Gateway specifically or carve-out networks in general.

Moreover, there is little evidence to support the inference that the two hospitals agreed to let Sagamore develop a plan to counteract the disincentives when Gateway was co-offered with Sagamore. St. Francis took a specific position with respect to employers who chose to offer Gateway and communicated that position to Sagamore and to M-J Insurance when requested to do so. Pl.'s Exh. 5, St. Francis/Sagamore Letter; Pl.'s Exh. 10, St. Francis/M-J Ins. Letter. Brehm testified at the hearing that St. Francis understood that it could lose business by taking this position. Further, the evidence suggests that St. Francis' concern was triggered by the threat of lost business from the HSBT employees. There is no evidence that St. Francis agreed to let Sagamore develop a plan to counteract the disincentive.

Community discussed with Sagamore the disincentives to use its hospitals when Gateway was co-offered with Sagamore's comprehensive network hoping that Sagamore would develop a solution. Hrg. Tr. at 607, Milkey-Cross. However, when Sagamore made a business decision to do

nothing, Community communicated to Sagamore its position with respect to its contract with Sagamore. *Id.* Although somewhat similar to St. Francis' position, Community intended to reduce its discounts to payors who co-offered Gateway and Sagamore in addition to reducing the administrative fee it paid to Sagamore by two basis points. Pl.'s Exh. 9, Community E-mail. Nevertheless, unlike the precipitant for St. Francis, there is no evidence that the HSBT's decision to contract with Gateway prompted Community's communication with Sagamore. The evidence is that Community's concern about the disincentives created by the Gateway network were independent of St. Francis' concern.

Neither St. Francis nor Community could effect a change in its status as a preferred provider in Sagamore's network through means other than changing the discount offered to Sagamore. The hospitals have no direct contact with the consumer of health care services - the employer - other than through and by its network relationships with companies such as Sagamore. Although the evidence suggests that Sagamore's decision to limit an employers' access to its network if it also purchases the Gateway network effectively resolves the problem with steerage raised by St. Francis and Community, the evidence does not tend to exclude the possibility that St. Francis and Community acted independently.

2. Conspiracy Between TPAs & Brokers Orchestrated by Sagamore

Gateway also argues that the evidence shows a conspiracy between TPAs and brokers to boycott Gateway with Sagamore "in the center as ringmaster." *Toys "R" Us*, 221 F.3d at 934. Gateway evidences this conspiracy with Sagamore's letter to its customers (primarily TPAs and brokers, although the evidence suggests that Sagamore's customers also include insurance companies

and employers) and the testimony of three brokers and a customer about their reaction to the letter. Gateway argues that Sagamore's letter coerced brokers and customers to boycott Gateway in violation of Section 1 of the Sherman Act.

For example, one of the brokers, Crossland, specifically testified that his brokerage felt threatened by Sagamore's letter because Sagamore's network is important to its business. Hrg. Tr. at 231, Crossland-Direct. In addition, Crossland stated that M-J Insurance had not made any new sales of the Gateway product after October 12, 2001, because of Sagamore's position as expressed in its letter of that date. *Id.* at 237. However, Crossland indicated that Nyhart, the TPA with whom M-J Insurance worked on the HSBT account, planned to continue offering Gateway to the HSBT at least. *Id.* at 236-37.

Ms. Hallie Mowid ("Mowid"), works for Marsh Advantage America, a division of Marsh & McLennan, a large brokerage firm for employee and health and welfare benefits. Mowid testified that when she learned of Sagamore's position on supplemental networks through Sagamore's October 12, 2001 letter, she stopped discussions with employer clients about the Gateway network. *Id.* at 300-01, Mowid-Direct. Even though Sagamore is not the only broad comprehensive rental network in the marketplace, Mowid testified that she would not promote the Gateway network if she could not offer the Sagamore network with it. *Id.* at 301; *id.* at 308-09, Mowid-Cross.

Deb Persic ("Persic") is Vice President, Self-Funded Plans, at Gardner & White Corporation, an insurance brokerage firm that operates in twenty states. *Id.* at 264, Persic-Direct. Persic testified that 50% of her self-funded clients utilize the Sagamore network. *Id.* at 266. When Persic received a copy of Sagamore's October 12, 2001, letter, she determined that she must cease marketing Gateway to her clients who utilized the Sagamore network because she was concerned that Sagamore

“could possibly say that [it would not] do business with [her] TPA.” *Id.* at 267-68. Although Persic admitted that Sagamore’s letter did not specifically name Gateway or any other supplemental or carve-out network, Persic perceived that Sagamore’s October 12, 2001, letter applied to Gateway only, not to other supplemental networks such as LabOne or transplant networks because “[t]he letter does not distinguish that.” *Id.* at 271.

Gardner & White is still marketing the Gateway product to the 50% of its self-funded clients that do not use the Sagamore network. *Id.* at 286. In addition, although it would be difficult to change an existing client’s network from Sagamore to another network, Persic testified that she could move the business to another network, such as Encore, if a customer using Sagamore wanted to continue using Gateway. *Id.* at 282.

Lynn Clothier is Chief Executive Officer of Indiana Health Centers, Inc. (“IHC”). *Id.* at 316, Clothier-Direct. IHC has just under 200 employees and has a self-insured health benefit plan for approximately 110 of those employees. *Id.* at 319-20. Approximately thirty of IHC’s employees live in the Indianapolis area. *Id.* at 335-36, Clothier-Cross. IHC has been self-insured for approximately two years and utilizes both Sagamore and Gateway. *Id.* at 320-21, 326, Clothier-Direct. Before becoming self-insured, IHC used the fully insured PPO product through Anthem. *Id.* at 321. IHC chose to become self-insured to lower its health care costs. *Id.* As it was making the change, IHC wanted to limit the number of changes in providers for its employees, which in some cases would be challenging because IHC employees often work in sparsely populated rural areas. *Id.* at 322-24, 316-18. In Clothier’s opinion, Sagamore offered the company the best coverage for IHC’s geographic needs. *Id.* at 324-25. Gateway was interesting to IHC because of the age of its employees and the ability for the company to cap its costs for cardiovascular and orthopaedic

services. *Id.* at 326. Clothier was unaware of any differential in cost to the employee for using Gateway, primarily because none of IHC's employees had utilized the network in the two years it offered the program. *Id.*; *id.* at 336-37, Clothier-Cross.

In October 2001, Clothier became aware of a problem with co-offering Sagamore and Gateway through IHC's broker, City Securities. *Id.* at 328, Clothier-Direct. At that time, IHC did nothing, but Clothier informed IHC's Chairman of the Board, Kopp, that if IHC was forced to pick between Sagamore and Gateway, it would choose Sagamore because of the difficulties associated with switching comprehensive networks. *Id.* at 329-30. Clothier testified that she never felt that her participation in the Sagamore network was in jeopardy in any way. *Id.* at 334, Clothier-Cross.

Gateway alleges that this testimony proves a conspiracy prompted by Sagamore between brokers, and the TPAs with whom they deal, and employers to boycott Gateway in the marketplace for rental networks in the Indianapolis metropolitan area. Gateway relies upon cases that make it unlawful for a company to coerce its customers or suppliers into boycotting a firm. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-94 (1985); *Toys "R" Us*, 221 F.3d 928, 934-937; *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 972-74 (7th Cir. 1995); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669-70 (7th Cir. 1985). A boycott is illegal *per se* if

(1) the boycotting firm has cut off access to a supply facility or market necessary for the boycotted firm . . . to compete; (2) the boycotting firm possesses a "dominant" position in the market (where "dominant" is an undefined term, but plainly chosen to stand for something different from antitrust's term of art "monopoly"); and (3) the boycott . . . cannot be justified by plausible arguments that it was designed to enhance overall efficiency.

Toys "R" Us, 221 F.3d at 936 (citing *Northwest Wholesale Stationers*, 472 U.S. at 294).

Gateway has not established such a conspiracy because it did not show that Sagamore cut off access to a market necessary for Gateway to compete as required by the first element articulated in *Toys “R” Us*. *See id.* The testimony of Gateway’s witnesses suggests that Sagamore’s position did not prevent Gateway from accessing the market of employers in the Indianapolis metropolitan area or prevent brokers, TPAs and customers from deciding to offer Gateway. Kopp himself testified that the brokers’ and TPAs’ responses to Sagamore’s October 12, 2001, letter were independent. He was asked: “Is it your understanding that whatever Gardner & White decided to do had no connection, or was not dependent upon whatever some other TPA might decide to do?” Hrg. Tr. at 208, Kopp-Recross. Kopp answered: “The TPAs acted independently is my belief, yes.” *Id.*

Moreover, the evidence shows that the brokers and TPAs in the Indianapolis area could offer Gateway with other rental PPO networks and would continue to do so. Specifically, Persic testified that she would continue to sell Gateway to the 50% of her customers that did not use Sagamore; approximately 25% of them use Encore, for example. *Id.* at 282, 286, 279, Persic-Cross. Crossland testified that the HSBT account would continue to use Gateway because Nyhart, a TPA, decided to continue offering it. *Id.* at 236-37, Crossland-Direct. Even Clothier testified that, theoretically, she could replace Sagamore in her benefit plan package rather than Gateway; she did not feel that IHC’s participation in Sagamore was in any way threatened, it just might have to make a choice. *Id.* at 334-35, Clothier-Cross. Other evidence also suggests that some customers would remain with Gateway and look for another comprehensive network rather than “boycott” Gateway and stay with Sagamore. *See* Pl.’s Exh. 12, E-mail, To: Greg Yust, From: Kelly Witt, RE: FW: Supplemental Networks, Nov. 7, 2001. This evidence shows independent decision making rather than concerted action to accomplish a common scheme to eliminate Gateway from the market.

Furthermore, Kopp testified that despite the alleged “boycott” of Gateway by TPAs and brokers orchestrated by Sagamore, Gateway anticipated contracting with a large multi-national, multi-site employer with a large number of employees in the Indianapolis area in 2002. Hrg. Tr. at 163-64, Kopp-Cross. This evidence suggests that any attempt by Sagamore to coerce all the TPAs and brokers who dealt in the Indianapolis market to join into a boycott of Gateway was ineffectual. In other words, Sagamore’s decision to limit access to its network did not cut off Gateway’s access to other comprehensive networks with whom it could successfully piggy-back in the Indianapolis metropolitan area.

For these reasons, the Court finds that Gateway is not likely to succeed in showing that Sagamore orchestrated a boycott of Gateway through the TPAs, brokers and customers in the Indianapolis area.

3. Conspiracy Between St. Francis & Sagamore - *Per Se* Liability

Gateway argues that St. Francis and Sagamore acted in furtherance of a common end to eliminate Gateway’s lower priced product in the Indianapolis metropolitan area. Specifically, after St. Francis learned that the HSBT had purchased the Gateway network for its enrollees, in October 2000, St. Francis communicated its position to Sagamore that its services were non-preferred when an employer chose to offer Gateway in addition to Sagamore. Pl.’s Exh. 5, St. Francis/Sagamore Letter. After discussing St. Francis’ complaint internally, Sagamore decided to ask St. Francis to put its position in writing. Hrg. Tr. at 398, 405, Yust-Direct. St. Francis’ letter to Sagamore indicated that St. Francis would raise its discount to those employers who chose to offer Gateway’s network in addition to Sagamore’s network because it interfered with St. Francis’ preferred provider

status in the Sagamore network. Pl.'s Exh. 5, St. Francis/Sagamore Letter. In addition, St. Francis indicated that it was not singling out the Sagamore network; St. Francis would also discuss the issue with other networks with whom it participated. *Id.* St. Francis did contact Encore and IHN, although there was no communication with these companies in writing. Hrg. Tr. at 471, Brehm-Cross.

Gateway alleges that this series of acts created a horizontal conspiracy among Sagamore and its competitors in the likeness of the conspiracy in *Toys "R" Us*. St. Francis furthered the conspiracy when it communicated its position to Crossland and assured Crossland that St. Francis was taking the "position with all networks with which it contracts." Pl.'s Exh. 10, Letter, To: Frank Crossland, M-J Insurance, From: Jay Brehm, St. Francis Hosp. & Health Centers, Aug. 30, 2001.

Gateway goes on to argue that at St. Francis' urging, through the letter and through Brehm's influence as Sagamore's Chairman of the Board, Sagamore adopted its own policy to limit access to its network when an employer chooses to purchase the Gateway network in addition to Sagamore's comprehensive network. In effect, Gateway argues, St. Francis and Sagamore are attempting to control the employers' choice to use Gateway's lower priced product by threatening to lower discounts and/or limit access to Sagamore's network. In other words, St. Francis and Sagamore acted in concert to eliminate financial incentives in the market for cardiovascular and orthopaedic care services.¹

¹The Court notes that Gateway implied during argument that the structure of Sagamore's PPO is anti-competitive in itself because all four major hospitals in the Indianapolis area are preferred providers. Hrg. Tr. at 533. Gateway contends that with this structure, the hospitals within Sagamore have no incentive to compete for the cardiology patient through lower prices. *Id.* Therefore, a program that threatens Gateway eliminates the only price competition among hospitals in Indianapolis. *Id.* The Court is not persuaded that the hospitals in the Indianapolis area have no incentive to compete for patients on price. The contracts between Sagamore and the

According to Gateway, the conspiracy is working because Crossland, Mowid and Persic testified that they will not sell Gateway if forced to choose between Sagamore and Gateway. *See* Hrg. Tr. at 231, 237, Crossland-Direct; *id.* at 300-01, Mowid-Direct; *id.* at 267-68, Persic-Direct. Moreover, Clothier, a Sagamore/Gateway customer, testified that she would continue using Sagamore if forced to choose. *Id.* at 329-30, Clothier-Direct.

In the antitrust context, a conspiracy is present when two or more parties have “‘a conscious commitment to a common scheme designed to achieve an unlawful objective.’” *Monsanto*, 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons*, 637 F.2d at 111). When circumstantial evidence of a conspiracy is used, “there must be some evidence that ‘tends to exclude the possibility’ that the alleged conspirators acted independently.” *Toys “R” Us*, 221 F.3d at 934 (quoting *Monsanto*, 465 U.S. at 764). The Court finds that the evidence does not tend to exclude the possibility that St. Francis and Sagamore acted independently.

The evidence shows that St. Francis developed its position about Gateway when the HSBT purchased access to the Gateway network in November 2000. Hrg. Tr. at 449, Brehm-Direct. The two letters reflecting its position are consistent in stating the reasons for that position. They stated, in pertinent part:

major hospitals in Indianapolis reflect varying discounts for each. *See* SAG Exh. 18, Sagamore/Clarian Contract; SAG Exh. 20, Sagamore/St. Francis Contract; SAG Exh. 21, Sagamore/St. Vincent Contract. In addition, there is no evidence that the cost for cardiac care at each of the hospitals is the same. Moreover, the testimony of Yust, Ted Milkey, David LoCascio, Keith DeTrude, evidences that Sagamore’s network competes with other PPO networks, both proprietary and rental versions, and sometimes with HMOs. Hrg. Tr. at 644-45, Yust-Direct; *id.* at 572, Milkey-Direct; *id.* at 704, 708, LoCascio-Direct; *id.* at 667-68, DeTrude-Direct. *See also* SFH Exh. 15, Gateway 2001 Bus. Plan, at 7-8 (listing Gateway’s competitors in the managed health plan market). There is no evidence that the discounts offered by the various hospitals in the Indianapolis area are the same in each of these PPOs.

Our hospital agreement with Sagamore provides that members will have equal access to our facility for all of the services that we offer. Our negotiated pricing arrangement with Sagamore is based on that assumption.

Because of this additional product offering, patients are being incentivised/steered to other facilities for one of our primary service lines. We would therefore require that the St. Francis Hospital discount for accounts who utilize this or any other type of carve out [sic] product be reduced to zero.

Pl.'s Exh. 5, Sagamore/St. Francis Letter. And,

It is important to understand that when St. Francis offers pricing concessions to a managed care network, it does so with the assumption that we will have equal access to all members who utilize that network. In situations where those members are incentivized [sic] to utilize facilities other than St. Francis, we believe that this significantly minimizes the benefits that St. Francis anticipates receiving in return for the discounts that we offer.

* * *

St. Francis values the relationship with the Hoosier School Benefit Trust and M-J Insurance. We believe that the discount St. Francis offers through Sagamore across all service lines is significant. We assume that in return we will not be disadvantaged as a hospital network participant.

Pl.'s Exh. 10, St. Francis/M-J Ins. Letter. Although there is no provision in the contract between St. Francis and Sagamore that explicitly provides for "equal access," the contract provision related to Sagamore's responsibility to maximize relationships with third parties, to maximize the number of covered lives and to provide incentives for those covered parties to utilize the services of Sagamore providers evidences the basic premise of PPOs generally. *See* Pl.'s Exh. 1, St. Francis/Sagamore Contract § 4.01(b). Testimony of Kopp, Yust, Clothier, Persic, Ted Milkey, David LoCascio and Keith DeTrude established the importance of preferred provider status within a PPO and the relationship between that status and the discount offered by providers. *See* Hrg. Tr. at 23-24, Kopp-Direct; *id.* at 625, 628-29, 636-38, Yust-Direct; *id.* at 421, Yust-Cross; *id.* at 333-34, Clothier-Cross;

id. at 279, Persic-Cross; *id.* at 572-75, Milkey-Direct; *id.* at 703-06, LoCascio-Direct; *id.* at 677-79, DeTrude-Direct. It is the interaction of steerage, discount and size of network that makes the managed health care market unique. With that principle in mind, there is no evidence that St. Francis' reaction to the steerage phenomenon created by Gateway overlaid onto a more comprehensive network is counterintuitive.

It is clear that St. Francis saw an issue only at the employer level. It intended for its reduced discount to reflect an employer's choice to add Gateway to its health benefit plan that changed the status of St. Francis because it disincentivised employees from using St. Francis for cardiovascular and orthopaedic services. The reduction in discount would serve to compensate St. Francis for the lost status of "preferred" among the employer's employees. There is no evidence that St. Francis intended to introduce a Sagamore-wide reduction in discount, although there was testimony that an employer-by-employer change in discount would be difficult for Sagamore to administer. The Court finds that St. Francis recognized it could lose business by taking this position and intended for the stated reduction to zero to be the start of negotiations on a reduced discount. St. Francis' position reflects the analysis of a supplier to a managed care network who finds itself not preferred.

Furthermore, the fact that St. Francis approached Sagamore with its position is not surprising because the evidence establishes that it is only through its networks that St. Francis provides discounts to employers. Gateway made much of the fact that Yust referred Kopp and Crossland to Brehm when Yust was asked about St. Francis' position on issues related to Gateway or the potential for St. Francis to participate in the Gateway orthopaedic program. The Court finds nothing conspiratorial about Sagamore referring these gentlemen to St. Francis to get St. Francis' position on a business issue. It is sound business practice for Sagamore to refrain from making

representations about St. Francis' interests and to refrain from acting as a middleman for any negotiations between Gateway and St. Francis. The Court finds this evidence more persuasive of no conspiracy than a furtherance of any conspiracy.

The Court is also persuaded that Sagamore developed its position on the issue of supplemental or carve-out networks independently. The evidence shows that Sagamore had started to develop a position relative to supplemental or carve-out networks at least as early as April 2000. SAG Exh. 28, E-mail, To: PPO Marketing; Executive PPO; Jackie Lee-McCord, From: Kelly Witt, RE: Carve Outs, Apr. 5, 2001, at SHN 32070, E-mail, Reply to Witt, From Jackie Lee-McCord, Apr. 9, 2001. It continued to study the issue after St. Francis notified Sagamore that St. Francis would increase its discount to employers who offered employees Gateway or other supplemental networks that incentivised employees to use a specific hospital. *See* SAG Exh. 28, E-mail, To: PPO Marketing; Executive PPO; Jackie Lee-McCord, From: Kelly Witt, RE: Carve Outs, Apr. 5, 2001; Hrg. Tr. at 822-23, Witt-Direct; Pl.'s Exh. 15, Kelly Witt, "Carve Out Networks [sic]", Apr. 23, 2001 (no e-mail attachment in exhibit). Sagamore's position on carve-out networks in approximately April 2000 was the same as it was after Witt and the marketing department at Sagamore studied the issue in early- to mid-2001: Only carve-out networks built for "out of area" services would be allowed. *Compare* SAG Exh. 28, E-mail, To: PPO Marketing; Executive PPO; Jackie Lee-McCord, From: Kelly Witt, RE: Carve Outs, Apr. 5, 2001, at SHN 32070 & 32072, *to* SAG Exh. 43, PPO CLAIMS QUALITY IMPROVEMENT TEAM MINUTES, SAGAMORE HEALTH NETWORK, INC., Aug. 29, 2001.

When St. Francis brought up the issue of the Gateway network to Sagamore in November 2000, Yust discussed the issue of supplemental and carve-out networks with his executive team.

Hrg. Tr. at 398, 405, Yust-Direct. The evidence suggests that the Sagamore executive team wanted St. Francis to put its position in writing, including clarification on: (1) whether St. Francis would apply its position to all networks with whom it contracted; and (2) whether St. Francis would apply the lower discount to specific employer groups or to payors who administered a particular employer group. Pl.'s Exh. 4, E-mail, To: Greg Yust, cc: Dwight Hall; Cheryl Perdue, From: Don Park, RE: Jay Brehm - Gateway, Nov. 15, 2000. At Yust and Johnson's request, Brehm included St. Francis' answers in a letter to Sagamore dated November 28, 2000. Pl.'s Exh. 5, St. Francis/Sagamore Letter. Gateway argues that because Brehm's letter answered these questions or issues posed by Sagamore, St. Francis and Sagamore were acting in concert.

The Court disagrees. Communication between a supplier and a distributor is commonplace, even when that communication is about competition, pricing or policy. *See Monsanto*, 465 U.S. at 762; *Toys "R" Us*, 221 F.3d at 939-40. There is evidence in the record that Gateway received similar letters that raised issues about the proper steerage mechanisms from its supplier, St. Vincent, in 1998 and again in 2000. *See* SFH Exh. 23, Letter, To: Patrick Blare, Gateway Medical Resource Alliance, From: Paul A. Kinkel, Director, Managed Care Contracting, St. Vincent Hospitals & Health Services, Feb. 9, 1998 (stating that St. Vincent noticed that a particular TPA contract "had a steerage mechanism which failed to meet the criteria outlined in Section 2.2.1 in our St. Vincent's/Gateway Hospital Services Agreement"); SFH Exh. 21, Letter, To: Terrence J. Kopp, Gateway, LLC, From Paul A. Kinkel, Director, Managed Care Contracting, St. Vincent Hospitals & Health Services, May 31, 2000 (stating that St. Vincent wanted to "address some provisions to [the current agreement, which [were] not performing up to [its] expectations such as . . . compliance with Section 2.2.1"). Gateway's contract with St. Vincent provides that Gateway will ensure,

through its contracts with payors, that employer benefit plans offering Gateway will include financial penalties for members who receive care from out-of-network providers. Hrg. Tr. at 131; SFH Exh. 1, HOSPITAL SERVICES AGREEMENT, Between St. Vincent Hosp. & Health Care Center, Inc. and Gateway, LLC, Aug. 1997, § 2.2.1. The penalties listed require the covered individual to pay either 20% of all physician and hospital charges or a flat out-of-network penalty of \$4,000. *Id.* Kopp testified that these penalties were rarely enforced; however, the letters Gateway received from St. Vincent indicate that St. Vincent took the provision seriously. St. Vincent's interest in obtaining the steerage it bargained for in its agreement with Gateway and communicating that interest to Gateway is hardly different from St. Francis' interest in obtaining the steerage it bargained for with Sagamore and communicating its position relative to that mechanism to Sagamore.

In addition, Sagamore's request that St. Francis answer some specific questions in its written version of its position on supplemental or carve-out networks is a legitimate business request. That St. Francis answered those questions is not a surprise because the answers to Sagamore's questions formed the basis of the position Brehm had already communicated verbally. The correspondence does not indicate a conspiracy.

In summary, the evidence establishes that the St. Francis to Sagamore letter was not a step in furtherance of a conspiracy because Sagamore's executive team had determined as early as April 2000 that Sagamore should not allow its network to be sold along side a carve-out network, Sagamore's marketing department discussed or studied the issue of carve-out networks for eight months in 2001 before Sagamore's executive team renewed its position from early in the year 2000, and Sagamore's position on the issue of carve-out networks was different than that of St. Francis.

Gateway argues that Brehm's position as Sagamore's Chairman of the Board influenced

Sagamore's decision to articulate its position on carve-out networks to its customers. However, there is no evidence that Brehm used his position to influence other Board members when Yust raised the issue of carve-out networks, Gateway and potential litigation at Sagamore's August 2001 board meeting. Pl.'s Exh. 56, Minutes of the Board of Directors Meeting of Sagamore Health Network, Inc., Aug. 13, 2001, at 8. The minutes of that meeting suggest that Yust reported the decision of the executive committee, and there were no objections to the decision by the Board. *Id.* Further, Yust and Brehm testified that neither man communicated St. Francis' position on carve-out networks to any other Board member. The Court is not persuaded that Brehm used his position as Chairman of the Board of Sagamore to influence Sagamore's position on carve-out networks.

Gateway offers little evidence in rebuttal to the Courts finding that St. Francis' and Sagamore's action were independent. Specifically, Gateway evidences Yust's letter dated December 19, 2001, to Ohio Valley Heart Care, Inc. Pl.'s Exh. 28, Letter, To: Alan Chamberlain, Exec. Dire., Ohio Valley Heart Care, Inc., From: Greg Yust, Sagamore, Dec. 19, 2001. In the letter, Yust states that Sagamore does "not object to [its] customers in the Evansville area offering the Gateway product in conjunction with the Sagamore Network." *Id.* This position is in direct contrast to Sagamore's position about carve-out networks generally that it communicated to its customers in October 2001. *See* Pl.'s Exh. 11, Letter, To: Alice J. Swanson, Gardner & White, From: Anita Strauss, Bus. Dev. Exec., Sagamore Health Networks, Inc., Oct. 12, 2001. Gateway asserts that there must have been a conspiracy between St. Francis and Sagamore in Indianapolis, the market relevant to St. Francis, because Sagamore took a different position on Gateway in Evansville.

But, the October 2001 letter went to all of Sagamore's customers regardless of where they were located. Hrg. Tr. at 829, Witt-Direct. One instance of relaxing the requirements, as Sagamore

implied it might do in the October 2001 letter, in Evansville does not negate the overwhelming inference that Sagamore arrived at its position about carve-out networks independently from St. Francis' position.

Even if the Court were to accept this rebuttal evidence, Gateway has not shown that the concerted action was illegal *per se*. Courts have developed two standards for determining whether a restraint of trade is unreasonable, the rule of reason and the *per se* rule. See *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993). "The nature of the restraint determines which rule will be applied." *Id.* Specifically, "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*." *Id.* at 1221. In distributor-termination cases there is a distinction between "concerted action to set prices and concerted action on nonprice restrictions." *Monsanto*, 465 U.S. at 761. The former are judged illegal *per se*; "[t]he latter are judged under the rule of reason." *Id.* In addition, so called horizontal price fixing, or "[c]oncerted action by dealers to protect themselves from price competition by discounters," is illegal *per se*. *Denny's Marina*, 8 F.3d at 1221-22.

The Court presumes that Gateway's argument is that the conspiracy between St. Francis and Sagamore is illegal *per se* because it is coerced concerted action between Sagamore and the other PPO networks to protect themselves from price competition by Gateway, because it is coerced concerted action between brokers, TPAs and customers to boycott Gateway, or because it is concerted action to set prices. With respect to Gateway's allegation that St. Francis coerced Sagamore into joining a conspiracy with other networks to boycott Gateway, Gateway has failed to make a showing of such a conspiracy. St. Francis' letters to Sagamore and Crossland state that St. Francis would communicate its position on carve-out networks to other comprehensive networks

with whom it contracts. *See* Pl.’s Exh. 5, St. Francis/Sagamore Letter; Pl.’s Exh. 10, St. Francis/M-J Ins. Letter. However, there is no evidence that any network other than Sagamore took any steps to effectuate a boycott of Gateway. To the contrary, Kopp testified that Gateway anticipated landing a fairly sizable account in the Indianapolis area in 2002. Hrg. Tr. at 163-65, Kopp-Cross. Presumably, this business uses a comprehensive network other than Sagamore.

Similarly, any argument fails that St. Francis and Sagamore together sought to influence brokers, TPAs and customers into boycotting Gateway for the reasons discussed in the prior section on a conspiracy between Sagamore and brokers, TPAs and customers. The only additional evidence for a similar coerced conspiracy that includes St. Francis is St. Francis’ letter to Crossland. But, the evidence shows that the single letter, to the single broker had no effect: the HSBT has continued to renew its contract with Gateway.

With respect to Gateway’s theory that St. Francis and Sagamore conspired “for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of” health services, the Court sees little likelihood of success on the merits. *Denny’s Marina*, 8 F.ed at 1221. The evidence is that St. Francis’ concern was about steerage or preference at a particular employer, not about the cost of cardiovascular care services. Furthermore, there is no evidence that St. Francis did not compete on price with other hospitals in the Indianapolis market. Nor is there evidence that all hospitals in the Sagamore network charged the same price for cardiovascular care services. Moreover, Sagamore had no influence on the price of St. Francis’ services; it merely negotiated a percentage discount of St. Francis’ prices. The record shows that St. Francis increased its prices in 2002 by 6% and Sagamore was able to capture only 3% in an increased discount. There is no evidence that Sagamore received this particular discount in exchange for its position on carve-out

networks as expressed in its October 12, 2001, letter to customers. Finally, the evidence shows that customers who wanted to continue using the Gateway product because of price, could do so using another comprehensive network such as Encore or IHN.

For the foregoing reasons, the Court finds that Gateway has less than a negligible chance of success in showing that St. Francis and Sagamore acted in concert to commit a *per se* violation of the antitrust laws.

4. Conspiracy Between St. Francis & Sagamore - Rule of Reason Liability

Although the parties focused mainly on a *per se* analysis, if Gateway's evidence is enough to show a conspiracy between St. Francis and Sagamore, then it could succeed in showing a likelihood of success on the merits if there is evidence that the result of the conspiracy was an unreasonable restraint on trade under the rule of reason analysis. *See 42nd Parallel North v. E Street Denim Co.*, No. 01-3017, 2002 WL 215894, at *2 (7th Cir. Feb. 13, 2002). Under the rule of reason analysis, Gateway must show that "the challenged restraint has adversely impacted competition in the relevant market." *Id.* at *3 (citing *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1402-03 (7th Cir. 1992); *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554-56 (7th Cir. 1980)). To make this determination, the Court must look at "the challenged restraint's effects on both intrabrand and interbrand competition." *Id.* However, because this analysis can be time-consuming and difficult, the courts have developed a shortcut and require that the plaintiff show that the defendant has market power. *Id.* (citing *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982)). "A company has market power if it can raise prices above a competitive level without losing its business." *Id.* (citing *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822

F.2d 656, 666-68 (7th Cir. 1987)).

Gateway argues that Sagamore has market power in the market for managed health care services for self-funded employers.² Gateway primarily relies upon its expert, Ronald T. Luke (“Luke”), to show Sagamore’s power in the relevant market. The Court excluded any expert testimony at the hearing, preferring instead to focus on the facts of the alleged antitrust violations. Both St. Francis and Sagamore have moved to strike Luke’s report because it does not meet the standard for admissibility pursuant to Federal Rule of Evidence 706 (“Rule 706”). Specifically, the report is not based upon data or facts gathered independent from discussions with Gateway employees or its counsel, the report is not based upon reliable principles and methods, and Luke did not apply antitrust principles reliably to the facts in the case. The Court has reviewed Luke’s report and finds it conclusory and unsupported by data or accepted methodology. For this reason, the defendants’ joint motion to exclude the opinions of Luke is **GRANTED**.

At the preliminary injunction hearing, Gateway’s evidence of Sagamore’s power in the managed health care market in Indianapolis (defined by Marion county and nine surrounding counties, referred to as the “donut counties”) focused on the self-insured employer. The Court disagrees with Gateway’s definition of the relevant market because the evidence supports the conclusion that the relevant market is the market for managed care health plans generally. Specifically, Crossland, LoCascio and DeTrude testified that the first step in designing a health benefit plan for an employer is an assessment of their needs. Hrg. Tr. at 243, Crossland-Cross; *id.* at 705-06, LoCascio-Direct; *id.* at 662-70, DeTrude-Direct. In addition, an employer may choose

²Gateway presents no evidence that St. Francis has market power in the market for health care services.

to buy an insured product or it may choose to become self-insured, in which case, it could use either a rental or a proprietary network. *Id.* at 706-10, LoCascio-Direct; *Id.* at 662-70, DeTrude-Direct. This initial decision does limit the employers choices of managed care programs; however, the evidence suggests that the options are plentiful both before and after the employer makes this choice. *Id.* at 665, 667, DeTrude-Direct; *id.* at 706, 708, 710, LoCascio-Direct. Gateway's business plan also considers its competition more broadly than rental managed care networks or managed care networks for the self-insured. Gateway considers many other types of products offered by many other types of companies competition for the managed care dollars of employers. SFH Exh. 15, Gateway 2001 Bus. Plan, at 7-8. In addition, Kopp testified that Gateway could sell its network in conjunction with an indemnity product, a POS, and possibly with a non-capitated HMO. Hrg. Tr. at 163, Kopp-Cross. Furthermore, a market definition that includes all types of managed care plans is consistent with other cases that have refused to narrow the product-market definition to either the market for HMOs or the market for PPOs. *See, e.g., Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1410 (7th Cir. 1995); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 748 F.2d 1325, 1335-36 (7th Cir. 1986). Although St. Francis and Sagamore dispute Gateway's definition of the geographical area of Marion county and nine surrounding "donut counties," the Court will assume that this geography is relevant for purposes of analysis under the rule of reason because the parties did not focus on this aspect in their proof at the hearing. Therefore, the Court finds that the appropriate market is the market for managed health care plans in the Indianapolis metropolitan area.

If the market is defined as the market for PPO and HMO managed care services, Sagamore estimates its market share is 19%-20% in the Indianapolis metropolitan area, or the nine county area

defined by Gateway's complaint.³ Hrg. Tr. at 808-09, Witt-Direct. Further, an Indianapolis area business journal reported that Sagamore is the second largest managed care organization serving Indiana. Pl.'s EXh. 57, *Indianapolis Bus. J.*, Book of Lists 2002, at 148 (ranked by Jan. 1, 2001, Indiana enrollment). Although this data suggests that Sagamore is an important player in the managed care market in Indianapolis, Gateway provided no evidence that Sagamore could raise prices above a competitive level and maintain its business. Moreover, the evidence that some employers would choose to maintain a relationship with Gateway and find another comprehensive network based on Sagamore's position on carve-out networks, suggests that Sagamore's services are fungible in the market for managed care plans. Evidence in the record also establishes that there have been new players in the managed care market in the Indianapolis metropolitan area and that the barriers to changing networks in the Indianapolis area are low, which further erodes Gateway's argument that Sagamore has "market power" to raise prices above competitive levels. *See* Hrg. Tr. at 161, Kopp-Cross; *id.* at 676, DeTrude-Direct.

Gateway also suggests that the evidence proves an adverse effect on competition sufficient to support a finding of an unreasonable restraint on trade. Gateway argues that elimination of its global case rate option in the marketplace will result in a reduction in competitive pressure on the hospitals in the Indianapolis area. Moreover, Gateway argues, there is evidence that the consumer, the employee, will lose the benefit of cost savings under the Gateway program because some employers will choose to stay with Sagamore instead of Gateway.

But, the consumer of managed health care plans is the employer, not the employee. And, as

³For reference, Sagamore estimates that if the market is defined as the PPO market, Sagamore has 26-27% market share. Hrg. Tr. at 809, Witt-Direct.

just stated, some employers will choose to stay with Gateway rather than Sagamore. The evidence supports this conclusion because there are several other comprehensive networks available in the Indianapolis area with substantially similar coverage to that of Sagamore. *Id.* at 285-86, Persic-Cross; *id.* at 674-75, DeTrude-Direct (describing Anthem as the largest PPO in the Indianapolis area, Sagamore matches Anthem's provider list to about 94%-96%, Encore matches Anthem's provider list to about 92%, and listing United Healthcare Network, PHCS and IHN as three other large networks in the Indianapolis area). In addition, the evidence shows that Gateway will continue to receive business from the HSBT and anticipates signing a contract with a large employer in the Indianapolis area in 2002. The evidence establishes that Gateway's product has not been foreclosed in the Indianapolis area.

The Court finds that Gateway is not likely to show that any conspiracy between St. Francis and Sagamore to influence employer choices in the managed care market in the Indianapolis area is an unreasonable restraint on trade under the rule of reason.

5. Summary

For the reasons discussed above, the Court finds that Gateway is unlikely to prove a conspiracy among hospitals, among brokers, TPAs and employers, or between St. Francis and Sagamore that would sustain a claim under the Sherman Act, § 1. Moreover, even if Gateway could show a conspiracy between St. Francis and Sagamore, under the circumstances presented here, Gateway is unlikely to succeed in showing such a conspiracy is an unreasonable restraint on trade either under a *per se* or a rule of reason analysis.

B. IRREPARABLE HARM IF INJUNCTION IS DENIED

Even if Gateway had a slightly better than negligible chance of success on the merits, it has not proven that it will be irreparably harmed absent a preliminary injunction. Kopp testified that he anticipated losing business if Sagamore was allowed to proceed with its position on carve-out networks because some brokers and TPAs had already indicated they would put new Gateway business on hold. In addition, Kopp testified that he believed Gateway would have difficulty surviving as a company if Sagamore's activity was not enjoined. Hrg. Tr. at 108, Kopp-Direct.

But, Kopp himself testified that not all customers would choose to retain Sagamore and drop Gateway. Hrg. Tr. at 183, Kopp-Cross. Furthermore, Kopp testified that, with the proper staff, he could estimate the amount of profits Gateway lost per lost account. *Id.* at 183-84. Moreover, Kopp testified that despite Sagamore's position in the marketplace on the co-offering of Gateway with Sagamore, the HSBT continued using Gateway and Gateway anticipated contracting with a large employer in 2002. *Id.* at 164-65. Further, the evidence establishes that Sagamore is not the only comprehensive network or managed care product with which Gateway may piggyback. *Id.* at 162-63, Kopp-Cross; *id.* at 241-42, Crossland-Cross; *id.* at 278-79, Persic-Cross; *id.* at 310-11, Mowid-Cross; *id.* at 334-35, Clotheir-Cross; *id.* at 674-75, DeTrude-Direct. This evidence suggests that Gateway can compete in the Indianapolis area while pursuing its case against St. Francis and Sagamore. The Court finds that Gateway has not shown irreparable harm if a preliminary injunction is denied.

C. SUMMARY

The Court has found that Gateway has less than a negligible chance of success on the merits.

Even if Gateway has a slightly better than negligible chance of success on the merits of proving that St. Francis and Sagamore committed a Sherman Act, § 1 violation, Gateway has failed to show irreparable harm if an injunction is not granted. Because Gateway has failed to make these threshold showings, its motion for a preliminary injunction should be **DENIED**.

IV. CONCLUSION

For the reasons discussed herein, the Court **GRANTS** the defendants' motion to strike the testimony and report of the plaintiff's expert. Further, the Court **DENIES** the plaintiff's motion for a preliminary injunction.

IT IS SO ORDERED this _____ day of March, 2002.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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